STATE OF MICHIGAN

COURT OF APPEALS

EDWINA DAY, Plaintiff-Appellee,	UNPUBLISHED October 25, 2007
v	No. 269446 Kent Circuit Court
HME, INC., Defendant-Appellant.	LC No. 05-002342-CK

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying its motion for attorney fees and costs. We affirm in part, reverse in part, and remand.

Defendant employed plaintiff for approximately two years. A provision in defendant's employee handbook, which was given to and acknowledged by plaintiff, stated that any litigation regarding the employment relationship must be brought within six months of termination of employment. On October 28, 2002, plaintiff and another female employee were involved in a verbal altercation. Defendant fired both employees. On March 8, 2005, plaintiff sued defendant, alleging that she had been subject to racial harassment. After all of plaintiff's claims were dismissed by stipulation, defendant filed a motion for attorney fees and costs under MCR 2.114 and MCR 2.625. The trial court denied the motion after finding that none of plaintiff's claims were frivolous.

We review a trial court's decision on a motion to impose sanctions under the clearly erroneous standard. *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997). A trial court's decision is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *Id.*

Under MCR 2.114(D), an attorney has an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201; 210; 530 NW2d 505 (1995). If a document is signed in violation of MCR 2.114(D), sanctions must be imposed pursuant to MCR 2.114(E). *In re Forfeiture of Cash & Gambling Paraphernalia*, 203 Mich App 69, 73; 512 NW2d 49 (1993). In addition, if a party pleads a frivolous claim, the party is also subject to costs under MCR 2.625(A)(2). MCR 2.114(F). A claim is frivolous if "[t]he party's legal position was devoid of arguable legal merit." MCL 600.2591(3)(a)(iii).

Defendant argues that sanctions are appropriate because any reasonable inquiry into the legal and factual viability of plaintiff's claims would have revealed that plaintiff waived her claims by failing to bring suit within six months of termination of her employment. At the time plaintiff filed her complaint, a contractual term that shortened the limitation period was enforceable as long as the limitation was reasonable. See *Herweyer v Clark Hwy Services, Inc*, 455 Mich 14, 20; 564 NW2d 857 (1997), overruled on other grounds *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). A limitation period was reasonable if the following three elements were met: "(1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action, and (3) the action is not barred before the loss or damage can be ascertained." *Id.*

After plaintiff filed her complaint, our Supreme Court decided *Rory, supra*. In *Rory*, the Court overruled the reasonableness test of *Herweyer* and held that "an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy." *Id.* at 470. Thus, while plaintiff's complaint was pending below, there was a change in the law regarding the enforcement of a contractual term that shortened the limitation period. We reject defendant's argument that this change in the law was irrelevant in light of *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 242; 625 NW2d 101 (2001). In *Timko* this Court simply held that no inherent unreasonableness accompanied a six-month limitation period in an employee contract. Contrary to defendant's suggestion, *Timko* did not prevent a future plaintiff from arguing that, pursuant to one or more of the *Herweyer* factors, a six-month limitation period contained in an employment contract was unreasonable.

At the time the complaint was filed, *Herweyer* was good law and provided precedent for an argument that the six-month limitation contained in defendant's employee handbook was unreasonable. Consequently, the trial court did not clearly err in finding that plaintiff's claims were not frivolous simply because the complaint was filed more than six months after plaintiff's employment was terminated. *Schadewald, supra*. Similarly, the trial court did not clearly err in finding that the signing of plaintiff's complaint was not in violation of MCR 2.114(D).

Because a party is also subject to costs under MCR 2.625(A)(2) for filing a frivolous claim, we must determine whether the trial court clearly erred in finding that none of plaintiff's individual claims were frivolous.[1] The trial court, without explanation, found that plaintiff's claims for relief under federal civil rights statutes and for attorney fees under MCL 500.3148 were not frivolous. This finding was clearly erroneous. Throughout the proceedings below, defendant asserted that the only federal civil rights statute that applied to plaintiff's claim was Title VII, 42 USC 2000e *et seq.* Plaintiff never disputed this. A plaintiff seeking relief under Title VII is required to exhaust her administrative remedies with the Equal Employment Opportunity Commission (EEOC) before pursuing judicial relief. *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 419; 550 NW2d 243 (1996) (opinion by Cavanagh, J.).

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[1] MCR 2.625(A)(2) provides that costs shall be awarded as provided by MCL 600.2591. MCL 600.2591 permits the assessment of costs and fees incurred in connection with the civil action.

A plaintiff has exhausted her administrative remedies when she has received a right to sue letter from the EEOC. *Shannon v Ford Motor Co*, 72 F3d 678, 684 (CA 8, 1996). Plaintiff has never asserted that she exhausted her administrative remedies and received a right to sue letter, much less has plaintiff actually produced a right to sue letter. Because plaintiff failed to exhaust her administrative remedies, there is no "arguable legal merit" that plaintiff could have obtained judicial relief on her Title VII claim. MCL 600.2591(3)(a)(iii). Likewise, there is no "arguable legal merit" that plaintiff could have obtained attorney fees under MCL 500.3148. MCL 500.3148, a section of the no-fault act, MCL 500.3101 *et seq.*, states that "[a]n attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue." This case did not involve insurance benefits. Accordingly, we are left with a definite and firm conviction that the trial court clearly erred in concluding that plaintiff's claims for relief under Title VII and for attorney fees under MCL 500.3148 were not frivolous under MCR 2.625(A)(2). *Schadewald, supra*.

The trial court also found that plaintiff's negligence claim was not frivolous because the question of whether the Civil Rights Act (CRA), MCL 37.201 *et seq.*, provided the exclusive remedy for discrimination claims arising in private employment was not definitively settled until after plaintiff filed her complaint. In support of this finding, the trial court cited *McClements v Ford Motor Co*, 473 Mich 373; 702 NW2d 166 (2005). But long before the Court decided *McClements*, it had held that, before the passage of the CRA, no remedy existed for discrimination in private employment. See *Heurtebise, supra* at 424-425; *Holmes v Haughton Elevator Co*, 404 Mich 36, 43; 272 NW2d 550 (1978); *Pompey v Gen Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971). Relying on *Pompey, supra*, the Supreme Court in *McClements, supra* at 381-382, stated that, because a remedy to enforce a right created by statute is strictly confined to the remedy provided by the statute, the plaintiff could not bring a common-law wrongful retention claim based on a coemployee's sexual harassment. Thus, at the time plaintiff filed her complaint, it had been established for nearly 35 years that Michigan did not provide a common-law remedy for discrimination in private employment. Consequently, there was no "arguable legal merit" to plaintiff's negligence claim. MCL 600.2591(3)(a)(iii). Indeed, plaintiff has never asserted an argument to advance her negligence claim. The trial court clearly erred in finding that plaintiff's negligence claim was not frivolous. *Schadewald, supra*.

The trial court also found, without providing an explanation for its finding, that plaintiff's CRA claim was not frivolous. Defendant argues, based on plaintiff's deposition testimony that a co-worker made only three race-related comments and that defendant took remedial action upon learning of the co-worker's comments, that plaintiff could not have succeeded on her hostile work environment claim. See *Radtke v Everett*, 442 Mich 368, 394, 396; 501 NW2d 155 (1993). However, the mere fact that a plaintiff will not prevail on a claim does not render the claim frivolous. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). In an affidavit, plaintiff's counsel averred that he "extensively interviewed" plaintiff before filing her complaint. According to counsel, plaintiff told him that the co-worker made "frequent racial comments" to her and that she had made "numerous complaints to [defendant's] human resource department about the co-worker's comments. Thus, it appears that plaintiff's deposition testimony was not consistent with the information she provided to counsel. Accordingly, we are not left with a definite and firm conviction that, at the time plaintiff filed her complaint, her CRA claim was "devoid of arguable legal merit," MCL 600.2591(3)(a)(iii). We therefore affirm the trial court's finding that plaintiff's CRA claim was not frivolous under MCR 2.625(A)(2).

In sum, we reverse the trial court's findings that plaintiff's federal civil rights and negligence claims, along with her request for attorney fees under MCL 500.3148, were not frivolous. The claims were devoid of legal merit and were frivolous. The trial court, on remand, must determine whether defendant incurred costs as defined in MCL 600.5291(2) in defending against those claims and, if so, shall award those costs to defendant. MCR 2.625(A)(2).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey